In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-70

EDWARD LLOYD STREET,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Edward Lloyd Street, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Unted States Court of Appeals for the First Circuit entered on July 1, 1976.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 9, is endorsed "Not For Publication".

Jurisdiction

The judgment of the court below was entered on July 1, 1976. It is printed in Appendix A hereto, *infra,* p. 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Was it error for the trial judge to allow testimony about petitioner's (i) other criminal acts and (ii) poor character, (iii) especially where its "minor probative value (was) . . . outweighed by (its) major prejudicial effect"?

Constitutional, Statutory and Other Provisions Involved

There are no constitutional or statutory provisions involved in this case.

F. R. Evidence, Rule 403, reads as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation or cumulative evidence."

Statement of the Case

On April 23, 1975, a three-count indictment was returned against petitioner Edward L. Street and four others — Carl Thomas Bannon, Jr., Jerome Fleet Cowden, Richard Kilcullen and Francis Ashby Reddall, Jr. Counts one and two charged the defendants with interstate transportation of two forged or falsely made checks, in violation of 18 U.S.C. § 2314 and § 2. Count three charged

the same defendants with conspiring to transport interstate forged or falsely made securities, in violation of 18 U.S.C. § 371. Each of the checks was the subject of a substantive count. "They were identical, but for their serial numbers — they were both for $97,500; both drawn on the Watertown, Massachusetts, account of a Charles Brennick; both apparently signed by Brennick," who "testified that he had not written or signed either check; that he had never authorized anyone else to sign checks for him; and, that he did not know anyone by the name of Jacob Weiner;" and "both (were) payable to and endorsed in blank by Weiner," who was never located by the FBI. (Appendix A hereto, p. 11.)

Petitioner was tried separately. The Government's evidence, the court below concluded, was sufficient to warrant the jury's findings that on Monday, December 10, 1973, petitioner transported the two falsely made or forged checks [1] from Marshfield, Massachusetts, to New York City where he deposited them into a bank account at a branch office of Bankers Trust Co. (Bankers) in the name of Island and Overseas Bank, Ltd. (IOB) of Tortola, British Virgin Islands; that despite petitioner's denials, he "knew at the time he transported the two . . . checks interstate, that the checks had been forged, falsely made or counterfeited;" and that petitioner, accompanied by Kilcullen, his lawyer and a codefendant, had opened the IOB bank account on the preceding Monday. Earlier that year he had purchased the IOB charter, which was "no more than a corporate shell, without assets, paid-in capital, employees,

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[1] "An FBI handwriting expert testified that the two check forms had been copied from genuine Brennick forms, and that the Brennick signatures on both checks had been traced. The expert could not, however, identify, the person or persons who had in fact either done the tracing, filled out the checks, or signed Jacob Weiner's name." (Appendix A hereto, p. 13.)

or place of business," from a Miami, Florida attorney by the name of Cooper. The court below also concluded that petitioner's "actions from the start were indicative of his knowing participation in this venture." (Appendix A hereto, p. 16.)

During the trial, a Bankers branch manager was allowed to testify over petitioner's objections that there were restrictions on banks under the laws of the State of New York; that it was necessary for a bank to obtain a charter from Banking officials of that state before it could engage in the banking business in that state; and that it certainly was not customary for a bank officer to dip into funds or bank deposits to pay his own personal expenses.[2] (2 Tr. 31-32.)

Later, upon petitioner's objection that Cooper, the Miami, Florida attorney, should not be permitted to testify because his proposed testimony would tend to prove that petitioner not only was impecunious but also a deadbeat, the prosecutor made an offer of proof, following which the trial judge overruled petitioner's objections and allowed Cooper to testify. (2 Tr. 44-45.)

During the course of his direct examination, Cooper testified that on January 16, 1973, he sold the IOB charter to petitioner for $35,000, receiving the sum of $8,000, a promissory note for $2,000 payable on or before January 19, 1973, and a second promissory note for $25,000 payable on or before April 7, 1973; and thereafter, subject to petitioner's separate objections, that petitioner never paid the two promissory notes; that he (Cooper) notified the

[2] The evidence disclosed that petitioner had drawn freely for his own personal use on the IOB account at Bankers into which the two falsely made or forged checks had been deposited, as well as on a savings account in the Marshfield branch of the Lincoln Trust Co., into which he had deposited nine Bankers cashier's checks, each for $10,000., charged against the IOB account. (Appendix A hereto, pp. 11-12, 16.)

Register of Companies in Tortola that the sale had been annulled; that petitioner telephoned him between January 16, 1973, and February 2, 1973, complaining that he had been to Tortola and had learned that under the new banking regulations a banking license was required; that on February 2, 1973, he wrote a letter (Ex. 22) to petitioner, telling petitioner that if he did not want IOB, he (Cooper) could make available to him a banking corporation on St. Vincent, which was licensed to operate offshore, for $12,500; that he would give petitioner a credit of $8,000 but wanted the balance of $4,500 paid by a cashier's check as he did not wish to enter into any more financing agreements with him; and that he never heard from petitioner after that. (2 Tr. 46-58.)

Petitioner was found guilty on all three counts. He was sentenced to be imprisoned for a period of eighteen months. Execution of that sentence was stayed pending an appeal and petitioner filed seasonable notice of his appeal.

The court below affirmed the judgment of the district court, holding with respect to the questions presented herein, that the testimony of a Bankers branch manager "regarding customary practices for bank officers, which the court admitted, was relevant to the propriety of Street's disposition of the funds in the IOB account and sufficiently related to the crime charged to be probative. . . . And testimony regarding the rescission of Street's purchase of the IOB charter was similarly admissible circumstantial evidence." (Appendix A hereto, p. 19.)

The court below's mandate has not yet issued.

Reasons for Granting the Writ

I.

The testimony of the Bankers branch manager was, of course, evidence of other criminal activity.

"The general rule is that extra-indictment prior criminal conduct is not admissible against an accused . . . There are, however, exceptions to this general rule of exclusion." *United States* v. *Jones,* 438 F.2d 461, 465 (1st Cir. 1971).

Under the exceptions evidence is admissible "either to show that defendant acted knowingly or wilfully . . . or because it was 'so blended or connected with the (evidence of the offenses) on trial . . . that proof of one incidentally involve(d) the other . . . .' *Green* v. *United States,* 176 F.2d 541, 543 (1st Cir. 1949), quoting *Bracey* v. *United States,* 79 U.S. App. D.C. 23, 142 F.2d 85, 87, *cert. denied,* 322 U.S. 762 . . .", *United States* v. *Murphy,* 480 F.2d 256, 260 (1st Cir. 1973), *cert. denied,* 419 U.S. 912; or "when of independent relevancy", *United States* v. *Forgione,* 487 F.2d 364, 366 (1st Cir. 1973), *cert. denied,* 415 U.S. 976; *United States* v. *McGovern,* 499 F.2d 1140, 1144 (1st Cir. 1974). See also *Spencer* v. *Texas,* 385 U.S. 554, 560-561 (1967), and especially the cases and authorities cited in fn. 7.

None of such evidence came within any of the exceptions. But even if relevant, its "minor probative value (was) . . . outweighed by (its) major prejudicial effect." *United States* v. *Forgione,* 487 F.2d at 366; and the testimony should have been excluded, F. R. Evidence, Rule 403, 28 U.S.C.A.

II.

Cooper's testimony tended to establish that petitioner had a bad character.

As the Supreme Court said in *Michaelson* v. *United States,* 335 U.S. 469, 475-476 (1948), "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer* v. *United States,* 245 U.S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Cf. F. R. Evidence, Rules 403-405, 28 U.S.C.A.

The introduction of evidence that petitioner was a deadbeat in the Government's case-in-chief constituted prejudicial error. Cf. *United States* v. *Gray,* 468 F.2d 257, 260-261 (3rd Cir. 1972).

III.

It seems to petitioner that the issues dealing with the testimony about petitioner's other criminal acts and poor character raise questions of sufficient importance in the proper administration of criminal law in the federal courts, and should be resolved definitively by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1483

UNITED STATES OF AMERICA,
APPELLEE,
v.
EDWARD LLOYD STREET,
DEFENDANT, APPELLANT.

APEEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges.*

Manuel Katz for appellant.
Henry H. Hammond, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellee.

July 1, 1976

CAMPBELL, *Circuit Judge.* Edward L. Street was convicted following a jury trial of the interstate transportation of two forged or falsely made checks, in violation of 18 U.S.C. § 2314 and § 2, and of conspiracy under 18 U.S.C. § 371. Indicted with four codefendants, Carl Thomas Bannon, Jr., Jerome Fleet Cowden, Richard Kilcullen, and Francis Ashby Reddall, Jr., Street was tried separately.[1]

[1] Cowden likewise was tried alone; the other three were tried together.

He now alleges various errors, the most serious being an asserted insufficiency of the evidence to show his knowledge that the two checks had been forged or falsely made. We affirm the judgment of conviction.

We recount in detail the complex chain of events brought out at trial. Street, a retired Navy officer living in Marshfield, Massachusetts, was an insurance salesman and self-styled entrepreneur. There was evidence that on December 3, 1973, accompanied by Richard Kilcullen, ' 's lawyer and a codefendant,[2] Street went to New York and opened a bank account at a branch office of Bankers Trust Co. (Bankers) in the name of the Island and Overseas Bank, Ltd. (IOB), of Tortola, British Virgin Islands. Street had purchased the charter of IOB earlier that year, although by December there was room for doubt that he still possessed any interest in IOB.[3] Street, in any event, signed a bank signature card as IOB's president, telling George Littlejohn, the branch manager, that the account would be very inactive. IOB was then no more than a corporate shell, without assets, according to Littlejohn's testimony, either Street or Kilcullen represented to him that IOB had $1,000,000 paid-in capital.[4]

[2] Kilcullen was then associated with a rather large law firm in the same building as Bankers. He and Street had collaborated on a number of unsuccessful business ventures since 1971.

[3] Shortly after the contract of sale was entered into, Street discovered that Tortolan law had been changed to require licenses of those Tortolan banks which conducted all their operations outside Tortola. No such licenses had been required before. As IOB fell within that category and thus had no license, Street complained to the seller, who offered Street another bank charter in substitution. The matter was not, however, resolved, and Street subsequently defaulted on his payments under the contract. The seller thereupon rescinded the sale and notified the Registrar of Companies in Tortola to that effect.

[4] Kilcullen, who testified on Street's behalf, denied that either of them said anything of the sort. On direct examination Street denied having made this representation, but conceded on cross-examination that he might have done so.

Although Street had said that the new IOB account would be very inactive, he returned to Bankers a week later, December 10, to deposit two checks. These were the checks referred to in the indictment. They were identical but for their serial numbers—they were both for $97,000; both drawn on the Watertown, Massachusetts, account of a Charles Brennick; both apparently signed by Brennick; and both payable to and endorsed in blank by a Jacob Weiner. After the checks had cleared, Street returned to New York and Bankers on December 18. Again accompanied byKilcullen, he withdrew $100,000, in ten $10,000 cashier's checks made out to the Lincoln Trust Company. Street told Littlejohn that he needed the money for a transaction with Lincoln Trust.[5] He also wrote five checks on the IOB account that day: two payable to himself, each for $2,000; two payable to Kilcullen, each for $2,000; and one payable to Kilcullen's law firm, for $1,000. The following day, back in Massachusetts, Street opened a savings account in his own name at the Marshfield branch of Lincoln Trust and deposited the ten cashier's checks. He returned to Lincoln Trust later that day, before the checks had been sent to the clearinghouse, and retrieved one of them; that check was negotiated the next day by Carl Thomas Bannon, codefendant.

The remaining nine checks, even though cashier's checks and thus readily negotiable, were slow in clearing, much, it would appear, to Street's chagrin. He attempted to withdraw the entire $90,000 on December 21, two days after it had been deposited, but Thomas McDavitt, the branch manager, refused because the checks had not yet cleared. Street then dropped his request to $55,000, to no avail,

[5] Street testified at trial that he first contacted Fred Merchant, vice president of Lincoln Trust, on December 11 to discuss the deposit of these funds. However, Merchant testified that Street did not contact him until December 19, when he opened an account there.

and after a half hour of wrangling, Street gave up and left.[6] Over the next few days, Street persistently called McDavitt several times a day about withdrawing the money; he was generally upset and somewhat abrasive. In the course of one of those calls, Street had McDavitt speak with someone identified as "Attorney Cowden" to verify that the checks had in fact been deposited. When the cashier's checks were finally confirmed via cable from New York on December 27, Street immediately withdrew $55,000 and apologized for his harassing behavior.[7]

Records from Bankers showed that during these few days prior to the $55,000 withdrawal, Street wrote five more checks on the IOB corporate account: two payable to J. Fleet Cowden, codefendant, for $20,000 and $5,000; and three payable to New England Telephone Co., for a total of over $2,000. Street wrote additional checks on the IOB account: on December 5, to Plymouth Five Cent Savings Bank for $305.84, to Avco for $416.16, and to himself for $200; on December 27, to Kilcullen for $10,000 (with a notation that it was a loan); and on December 28, to himself for $500. He also made other withdrawals from the Lincoln Trust account: $4,000 cash on January 3, and over $10,000 in bank checks on January 8, of which $10,000 was payable to himself, and the balance payable to the Town of Marshfield.

There was evidence that the two Weiner checks deposited at Bankers were not what they purported to be. Charles Brennick, the drawer, testified that he had not written or signed either check; that he had never authorized anyone else to sign checks for him; and that he did not know

[6] McDavitt testified that Street said he was hard-pressed for the money because he had a payroll to meet. Street, however, testified that he used the word "payroll" only to raise a hypothetical, i.e., what if he did have a payroll to meet?

[7] McDavitt testified that Street again mentioned "payroll" at that encounter.

anyone by the name of Jacob Weiner. (Nor could the FBI in its investigation locate any such individual.) Brennick stated that he did not learn of the checks until January 7, 1974, after his December statement had come in. An FBI handwriting expert testified that the two check forms had been copied from genuine Brennick forms, and that the Brennick signatures on both checks had been traced. The expert could not, however, identify the person or persons who had in fact either done the tracing, filled out the checks, or signed Jacob Weiner's name.[8]

Brennick also described his financial condition at the time the Weiner checks were negotiated. Although the well-to-do owner of a small empire of nursing homes, he was in a rather tight cash position in early December. His personal account (on which the Weiner checks were drawn) was then $237,000 overdrawn. He had arranged a $1,400,000 loan in September and expected it to come through around December 3, which would enable him to cover the overdraft and repay a sizeable short term loan from his bank. The closing was delayed, however, and the money did not in fact arrive until December 10, causing some problems with creditors. It was immediately deposited upon arrival in the accounts of two nursing homes owned by Brennick and was then transferred into his personal account. The Weiner checks were debited against

[8] On cross-examination, Street attempted to show that Brennick himself had prepared the checks in order to collect on his forged check insurance, while still retaining the proceeds of the check. Brennick controlled a number of bank accounts among which he constantly transferred sums of money. He admitted, moreover, that when paying off gambling losses he normally wrote checks payable to fictitious payees, Charles or George Peterson, to conceal his gambling from his bank. The jury was plainly entitled, however, to credit the Government's evidence and to disbelieve that Brennick had written the two checks in question. The court properly instructed the jury that the checks wre not falsely made if prepared by Brennick or by someone acting under his authority.

that account on December 12. Had they been debited as much as two days earlier there would not have been funds to cover them. Brennick testified that few people knew that his personal account contained large amounts of money, or that this particular sum was to be deposited. Codefendant Frank Reddall was one of those few. He was Brennick's bookkeeper; he worked in an office in Brennick's home and was responsible for managing Brennick's complex and detailed financial records. According to Brennick, Reddall knew of the $1,400,000 loan and its due date at least as early as November.

Street took the stand to give the following explanation of his involvement with the two Weiner checks.[9] He denied knowing that the checks were falsely made or forged. He said that a few days after he had opened the IOB account, he was approached by a business associate, Bannon, about processing two checks and then retaining and distributing the proceeds as directed. He was not told the amount of the checks. He testified that there was some mention of the possibility of eventually transferring the proceeds overseas. Street expressed interest in the proposal and suggested the sum of $10,000 for his services.[10] That evening he telephoned Kilcullen and described the proposal, which Kilcullen advised seemed legal. Street thereupon

[9] FBI agent Harold Klaus, who had interviewed Street several times following Street's arrest in mid-January, also testified at trial. By referring to his notes from those meetings, he was able to recount what Street had said. Street's testimony at trial was generally consistent with Klaus's report of his earlier statements. Kilcullen testified to the extent of his own involvement, which was considerably more limited than Street's. His testimony generally tracked Street's.

[10] Agent Klaus testified that, during Street's first interview, Street said his fee was $5,000, and that Street later told him it was $10,000. Street testified that he was not being inconsistent — $5,000 was his personal fee and $10,000 his and IOB's combined fees.

met with Bannon and Cowden[11] the following day, Friday, December 7, at Bannon's office in Boston. The meeting was rather brief. Street asked Cowden to produce identification and Cowden gave Street the two Weiner checks. Cowden identified Weiner as his client and vouched for the Weiner endorsements; Street did not question why Weiner sought his services. The checks were dated December 10.[12]

Street testified that the following week, on December 12, Bannon told him that $10,000 would be acceptable as his fee and remarked that his own fee would be $25,000, in part because of his other business dealings with Cowden.[13]

Street also explained his insistence upon withdrawing the money from Lincoln Trust so quickly. He stated that he was being pressured by Cowden, and indeed had to give Cowden $25,000, drawn from the IOB account at Bankers, prior to the withdrawal from Lincoln Trust. For that reason he only had to withdraw $55,000 from Lincoln Trust. By his own account he delivered that money, in cash, to Cowden by the side of a highway in Marshfield or nearby Pembroke.

Street also explained some of the checks and withdrawals listed above. He stated that the tenth cashier's check, which he retrieved before it had cleared, and the $4,000 cash withdrawn from Lincoln Trust, were part of Bannon's fee. Furthermore, he stated that of the $14,000 given to Kilcullen, $2,000 was his fee for past legal services, including his advice in this transaction, and $12,000 was loans.

[11] Brennick testified that Cowden was a very close friend and associate of Reddall, his bookkeeper. The two were in almost daily contact, and on several occasions in the past Reddall had arranged business meetings for Cowden with Brennick.

[12] Street testified that he did not notice that the checks had been post-dated until a day or two after the meeting.

[13] Street had told Agent Klaus, however, that Bannon's fee was to be $14,000. This inconsistency may have been due to the fact that Bannon, by Street's account, only received $14,000 and agreed to let Street draw on the balance. Yet Street produced a receipt at trial from Bannon, dated January 3, 1974, for the full $25,000.

A $5,000 withdrawal from Lincoln was deposited in an account at New England Merchants Bank which Street testified he opened in order to establish a correspondent bank for the further transfer of funds. The other withdrawals from Lincoln Trust and Bankers, he said, were for his own fee and for his expenses in connection with processing the checks.

Street's principal argument on appeal is that the evidence was insufficient to prove, either directly or circumstantially, that he knew the two Weiner checks were forged, falsely made, or counterfeited. Such knowledge was, of course, an essential element of the Government's case. *E.g., Pauldino* v. *United States,* 379 F.2d 170 (10th Cir. 1967). We must therefore decide "whether a rational juror drawing reasonable inferences from the evidence viewed in the light most favorable to the government could have found guilt beyond a reasonable doubt" as to this key element. *Villarreal Corro* v. *United States,* 516 F.2d 137, 140 (1st Cir. 1975) (citations omitted).

We conclude that the jury could infer on this record that Street knew at the time he transported the two Weiner checks interstate that the checks had been forged, falsely made, or counterfeited. Street's actions from the start were indicative of his knowing participation in this venture. We first see Street—on the same day Brennick's loan was supposed to come through—opening a bank account for IOB and representing that he was its president. The jury could have found that he grossly misrepresented IOB's paid-in capital and held himself out as having a relationship with IOB that he no longer possessed. Then, by his own testimony, Street apparently suggested a fee of $10,000 for the relatively simple chore of depositing two checks and distributing their proceeds. When he purportedly suggested that figure, he did not even know the amount of the checks to be negotiated. It also seems to have been Street's idea

to route those checks in a rather circuitous and indeed inconvenient fashion through IOB's New York account and then back to a Massachusetts bank. He was then residing in Massachusetts, where both he and his wife already had bank accounts in which the checks could easily have been deposited. He may have wanted to segregate the money, since he was essentially acting as a trustee, but he certainly could have done so in Massachusetts. Both the fee arrangement and Street's chosen check cashing procedure suggest that Street knew the kind of checks he was dealing with.

Furthermore, he drew freely on the deposits for his own personal use, beyond his promised fee and seemingly without regard for any legal distinction between IOB corporate funds and his personal funds. He withdrew a total of $14,700 in checks payable to himself (of which he testified $2,000 was a loan) and wrote other third party checks for almost $4,000 for what appear to have been personal expenses. This amounted to almost $9,000 more than his purported fee, which he himself testified was to include expenses. In addition, he spent $3,000 on legal fees, although there was no indication that such expenditures were authorized beyond his own fee. Indeed, there was evidence that the fees represented services unrelated to this transaction: $1,000 was simply a retainer for Kilcullen's firm and, according to Kilcullen, the $2,000 which he received was for previous legal advice and was unrelated to this transaction (although Street testified that it was related). This free spending suggests either that Street was a principal in the forgery scheme, and so was not limited to a $10,000 fee, or else that Street knew he could not be held acountable because the forgers who hired him could not risk revealing their own complicity by complaining of his overreaching.

Added to this are certain other incredible elements in Street's own account of the transaction. He stated that he was given two checks, totalling $195,000 and as negotiable as cash, by a stranger who could have as easily processed the checks himself. He did not inquire who Jacob Weiner was, although Cowden did vouch for him, or why his own services were needed. In addition, Street transferred $55,000 in cash to Cowden by the side of a road. There were also inconsistencies in Street's statements to Agent Klaus regarding the amounts of his and Bannon's fees, and misstatements to Littlejohn and McDavitt regarding what he planned to do with the money which he withdrew. Such discrepancies and misstatements strengthen the Government's case by suggesting that Street was fabricating stories to cover himself, but fudging the details.

At the close of all the evidence, the court instructed the jury that proof that Street "merely suspected or surmised or conjectured" that the checks were forged or falsely made would not satisfy the Government's burden. It is true that the Government's case against Street consisted of bits of circumstantial evidence which, taken separately, might only be mildly suggestive of guilt. But we think that, in toto, the jury could properly have found that Street not merely suspected some illegality, but that he in fact knew that the Weiner checks had been forged or falsely made. To be sure, he proposed an alternative theory of the case consistent with his claim of ignorance. But this theory was so implausible and inconsistent that the jury could disbelieve it and, on the facts before it, return a verdict of guilty.

Street also asserts error in several evidentiary rulings. He contends that the court should have excluded as conclusory Brennick's testimony that Reddall was aware that the $1,400,000 loan was due around December 3, 1973.

See Fed. R. Evid. 701 (limiting the opinions or inferences of non-experts to those "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue"). A court, however, has a substantial measure of discretion in permitting witnesses to testify to impressions derived from their own perception of basic facts. *Zimberg* v. *United States,* 142 F.2d 132, 135 (1st Cir.), *cert. denied,* 323 U.S. 712 (1944), *quoting Central R. Co.* v. *Monahan,* 11 F.2d 212, 214 (2d Cir. 1926). (L. Hand, J.) Here the court not only inquired if Brennick knew of his own personal knowledge whether Reddall was aware, receiving an affirmative response, but had before it a great deal of evidence that Reddall, Brennick's bookkeeper, was privy on a daily basis to Brennick's affairs. We think it did not abuse its discretion in allowing Brennick to say what he did.

The court's other challenged evidentiary rulings were similarly within its discretion. The definition of "kiting checks", which Street sought to introduce via Brennick but which was excluded, was of marginal relevance, particularly since Brennick had already denied engaging in that practice. It was properly excludable. *See* Fed. R. Evid. 403. Littlejohn's testimony regarding customary practices for bank officers, which the court admitted, was relevant to the propriety of Street's disposition of the funds in the IOB account and sufficiently related to the crime charged to be probative. *Cf. Green* v. *United States,* 176 F.2d 541, 543 (1st Cir. 1949); Fed. R. Evid. 404(b). And testimony regarding the rescission of Street's purchase of the IOB charter was similarly admissible circumstantial evidence.

Street finally asserts error in the trial court's refusal to give his requested instructions on the requisite knowledge and intent under the conspiracy count. We have reviewed the court's charge and find its instructions on that element to have been adequate.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 75-1483.

UNITED STATES OF AMERICA,

APPELLEE,

v.

EDWARD LLOYD STREET,

DEFENDANT, APPELLANT.

JUDGMENT

Entered July 1, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc: Messrs. Katz and Hammond.]

No. 76-70

In the Supreme Court of the United States

OCTOBER TERM, 1976

EDWARD LLOYD STREET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-70

EDWARD LLOYD STREET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court abused its discretion by admitting evidence of his poor character and prior bad acts.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two counts of transporting a forged check in interstate commerce, in violation of 18 U.S.C. 2314 and 2, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371.[1] He was sentenced to 18 months' imprisonment. The court of appeals affirmed in an unpublished opinion (Pet. App. A).

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[1]Co-defendants Carl Thomas Bannon, Jr., Jerome Fleet Cowden, Richard Kilcullen, and Francis Ashby Reddall, Jr., were tried separately and convicted on similar charges.

The evidence at trial is set forth in detail in the opinion of the court of appeals. It showed that petitioner and co-defendant Kilcullen travelled from Massachusetts to New York on December 3, 1973, to open a bank account at the Bankers Trust Company in the name of the Island and Overseas Bank, Ltd. (IOB) of Tortola, British Virgin Islands. Petitioner represented to bank manager George Littlejohn that he was president of IOB, that the company had some one million dollars in paid-in capital, and that the company's account would remain inactive. In fact, IOB was a corporate "shell" which petitioner had purchased from a Miami lawyer named Saul Cooper in January 1973 (Pet. App. 10). Cooper testified about the details of the sale, including the fact that petitioner had defaulted on the promissory purchase notes in January and April 1973 and that he (Cooper) had thereafter rescinded the sale and had notified the Registrar of Companies in Tortola that the sale had been annulled.[2]

Petitioner returned to Bankers Trust on December 10, 1973, and deposited two $97,000 checks purportedly drawn on the Watertown, Massachusetts account of a Charles Brennick, payable to and apparently endorsed by a Jacob Weiner. Each of these checks had been forged, with Brennick's signature having been traced onto the checks from a specimen of his genuine signature. (Pet. App. 11, 13).[3] After these checks had been cleared by Bankers

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[2]Cooper related that, in January and February 1973, petitioner had complained that IOB did not have a license that was required of all banks under a new Tortolan bank law. Cooper had agreed to exchange IOB for a corporate banking shell in another Carribean sovereignty, but petitioner never responded to this offer and instead proceeded to default on the IOB purchase (Pet. 5).

[3]Brennick was a Massachusetts businessman who, upon incurring financial difficulties, had recently secured a $1.4 million loan. The proceeds of this loan were credited to his account on December 10, 1973, the same day that the Weiner checks were dated. Only a few persons, including Brennick's bookkeeper, co-defendant Reddall, had known that the loan would be placed in Brennick's account on that date (Pet. App. 13-14).

Trust, petitioner withdrew $100,000 in cashier's checks and deposited them in a newly opened savings account in his own name at the Lincoln Trust Company in Massachusetts. One week later he withdrew $55,000 of this deposit in cash.[4] Petitioner also wrote two more checks, totalling $25,000, on the Bankers Trust account, payable to co-defendant Cowden (Pet. App. 12).

Petitioner contended at trial that he did not know the checks had been falsely made or forged. He claimed that shortly after opening the IOB bank account he had been approached by co-defendant Bannon, a business associate, and had been asked to process two checks and to distribute the proceeds as directed, all for a fee of $10,000. Petitioner alleged that after checking with co-defendant Kilcullen, his lawyer, to determine if the proposal was legal, he met with co-defendants Bannon and Cowden on December 7, 1973, at which time Cowden gave him the two Weiner checks, claiming that Weiner was his client. Petitioner also offered explanations for the several suspicious transactions that occurred after the checks had been deposited (Pet. App. 14-15).

In view of the substantial circumstantial evidence of petitioner's knowing complicity in the fraudulent scheme, the jury rejected his defense. This evidence included

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[4]Lincoln Trust did not allow petitioner to make any withdrawals until the cashier's checks had cleared, in spite of petitioner's false protestations that he had to meet a payroll (Pet. App. 12 and n. 6).

the fact that petitioner had misrepresented the status and assets of IOB to Bankers Trust, had suggested routing the checks in a circuitous fashion through several banks, and had agreed to a fee of $10,000 for performing functions that could easily have been carried out by co-defendants Bannon or Cowden. In addition, while petitioner claimed that he had been promised $10,000 for his services, he had written some $19,000 in personal checks upon the various Bankers Trust and Lincoln Trust accounts. Bank manager Littlejohn testified that it was not customary for a bank executive to utilize for personal expenses an official account such as that purportedly maintained by IOB at Bankers Trust.[5]

Petitioner contends (Pet. 6-7) that the district court abused its discretion by admitting Cooper's testimony concerning petitioner's default in the purchase of IOB and by admitting Littlejohn's testimony concerning New York banking law and the impropriety of a bank officer's use of bank funds to pay his personal debts. Although evidence of a defendant's other crimes or prior bad acts is inadmissible merely to show his bad character, the settled rule is that such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b), Fed. R. Evid. See, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Moore* v. *United States*, 150 U.S. 57, 61; McCormick, *Evidence* §190 (2d ed. 1972). The question of admissibility is addressed to the sound discretion of the trial court, which must determine whether the probative

[5]Littlejohn also testified that under New York law a bank was required to obtain a license from banking officials before it could do business in the State.

value of the evidence is outweighed by its prejudicial effect. See *United States* v. *Alejandro*, 527 F. 2d 423, 429 (C.A. 5), certiorari denied *sub nom. Rocha* v. *United States*, No. 75-6432, June 7, 1976; *United States* v. *Chapin*, 515 F. 2d 1274, 1284 (C.A. D.C.), certiorari denied, 423 U.S. 1015.

Here, the prime issue in dispute at trial was whether petitioner was aware that the Weiner checks had been forged or whether, as petitioner claimed, he had not known of the fraud and had been duped into cashing the checks while pursuing what he thought was a legitimate business deal. The challenged evidence was probative of petitioner's actual state of mind, since it showed that he had used a suspicious "shell" corporation to cash and distribute the checks, he had misrepresented himself to Littlejohn in claiming to be president of IOB, and, while purporting to function as a banker in his dealings with Bankers Trust, he had violated basic tenets of banking practice. The evidence was thus clearly relevant to establish that petitioner knew he was not pursuing a legitimate business transaction, and the district court properly admitted it at trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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